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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ROBERT T., et al., Persons Coming Under  
the Juvenile Court Law.

STANISLAUS COUNTY COMMUNITY  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

A.F., et al.,

Defendants and Appellants.

F070147

(Super. Ct. Nos. 516597, 516598,  
516599 & 516600)

**OPINION**

APPEAL from an order of the Superior Court of Stanislaus County. Ann Q.  
Ameral, Judge.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and  
Appellant A.F.

Carolyn S. Hurley, under appointment by the Court of Appeal, for Defendant and  
Appellant Robert T., Jr.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County  
Counsel, for Plaintiff and Respondent.

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Robert T., Jr. (father) appeals from an order terminating parental rights to his four children (Welf. & Inst. Code, § 366.26),<sup>1</sup> but challenges those orders only as they apply to his eldest child, now 11-year-old Robert. Father contends the juvenile court erred in declining to apply the beneficial parent-child relationship exception to adoption to Robert and in failing to consider Robert's wishes. The children's mother, A.F. (mother), also appeals. Mother joins in father's opening brief insofar as it challenges the order terminating parental rights and additionally contends that if we reverse the termination order as to Robert, we must reverse it as to the other three children and remand for consideration of whether the sibling relationship exception to adoption applies to those children. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In September 2012, the children, eight-year-old Robert, six-year-old Mathew, and five-year-old Nathaniel (collectively the boys), and one-year-old daughter A., were living with father and mother. The family came to the attention of the Stanislaus County Community Services Agency (Agency) on October 1, 2012, when it received a referral that on September 26, 2012, two loaded unsecured guns were found in the family's home, one on the bed and one in the open closet. A methamphetamine pipe was on the bed and a bag of methamphetamine was behind the television on a dresser in the bedroom. The home was filthy, infested with bed bugs, and there were holes in the wall. Robert told the reporting party that mother and father were always going into another room and smoking methamphetamine, which the children could smell. The home did not have water service; mother said the family was using water from the swimming pool. Father, a documented gang member, was in custody on a parole hold. The children were with their maternal grandmother, Carmen C. (grandmother).

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<sup>1</sup> Undesignated statutory references are to the Welfare and Institutions Code.

On October 2, 2012, the Agency received another referral that father and mother had been arrested for having drugs and weapons in the home, and the children were given to grandmother. The reporting party stated the home was infested with bedbugs and the children had numerous bites. Grandmother reportedly took the children to the doctor, who said they were behind on their immunizations. On October 11, grandmother called the Agency to report that A. had a sty near her eye and bedbug bites from the parents' home. Grandmother feared taking A. home because she believed mother was using methamphetamine, as the boys told her they had not been to school the prior week because mother was not waking up in the morning.

A social worker investigating the referral spoke with Robert at his school on October 23. Robert said that after the police came to his house, he stayed with grandmother for a while, but he went back with mother on October 5. Robert knew there was a gun in the bedroom his grandfather used before he died a few months prior; since grandfather's death, father and mother kept the bedroom door locked. Robert was not aware of drug use by his parents.

The social worker interviewed mother, who said the guns were in grandfather's bedroom and that she kept the bedroom door locked so the children did not have access to the guns. Mother claimed the guns belonged to a friend who sometimes stayed at the house and slept in grandfather's bedroom, where the methamphetamine and guns were found. While mother knew about the guns, she did not know about the methamphetamine. According to mother, the bedbugs were no longer an issue. While they did not have water for a couple days, the water was now on. On the day police came to the home, the children were not there. Mother explained that A. was not current with her immunizations because mother fell into a depression after grandfather's death, but A.'s immunizations were now up-to-date. The social worker inspected the home and found it tidy with sufficient food. Mother said that father made the holes in the wall a few years ago and claimed that while they experienced domestic violence in the past, it

stopped five years ago. Mother agreed to voluntarily drug test, but was unable to produce a urine sample.

The social worker interviewed father at the jail. He also claimed the guns and methamphetamine belonged to a friend who was staying with them and who slept in grandfather's bedroom, which was kept locked. Father said no one was allowed into that bedroom. Father did not want to release too much information because he claimed he was innocent and he did not want to talk without his lawyer. He did admit to drinking and using methamphetamine, but claimed mother did not use drugs.

Over the next few months, mother either was unable to provide a urine sample or failed to come into the Agency office to drug test when she agreed to do so.

On December 12, 2012, father's parole officer, Wendy Hall, told the social worker that father was released from jail on December 4 and was on parole until March or April 2013. Father told Hall he bought the guns in the hope of selling them to get money, as the family was "hard on money." Hall drug tested father the day before, but she would not get the results until the following week. According to Hall, there was domestic violence between father and mother. Before father's arrest, Hall was at the family's house and saw a hole in the wall that was not there on her last visit. Father told Hall the hole was made when mother threw something at him and hit the wall. According to Hall, the children have told her that their parents argue and yell a lot. Hall was going to send father to anger management class.

Mother and father agreed to participate in family maintenance services and were given referrals for a substance abuse assessment for February 2013, but neither attended the appointment. Also in February 2013, grandmother reported that A. had a boil on her bottom and was found sitting in a soaked diaper. That same day, mother and father refused to allow the social worker, a public health nurse and a police officer into their home.

On February 20, 2013, a protective custody warrant was obtained; the children were taken into custody and to a hospital for medical clearance. Robert and Nathaniel were diagnosed with a viral infection of the skin, while A. was diagnosed with cellulitis and abscess of the buttocks, abrasions of multiple sites and bug bites. On the way to the hospital, the boys disclosed that their house did not have gas or water.

The Agency alleged all of these facts in its petition as a basis for dependency jurisdiction under section 300, subdivision (b) (failure to protect). With respect to father, the petition alleged father was arrested for having drugs and weapons in the home, he used drugs, recent domestic violence had occurred in the home, and father was a known gang member. Other allegations included his failure to attend a drug and alcohol assessment after agreeing to do so, and the condition and medical neglect of the children. The children, who the juvenile court subsequently detained, were placed with grandmother.

#### *Jurisdiction/Disposition Report and Hearing*

The social worker's report prepared for the March 26, 2013 combined jurisdiction/disposition hearing recommended that services be offered to mother but denied to father pursuant to section 361.5, subdivision (b)(12).<sup>2</sup> Father had previous felony convictions for assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)); possession of a controlled substance for sale (Health & Saf. Code, § 11378); and robbery (Pen. Code, § 211).

In September 2012, father was charged with being a felon in possession of a firearm, possession of a controlled substance, owning prohibited ammunition, possession of unlawful paraphernalia, and violation of parole. The social worker noted father admitted using alcohol and methamphetamine; there was an allegation of recent domestic

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<sup>2</sup> Section 361.5, subdivision (b)(12) provides that a parent need not be provided reunification services if the parent has been convicted of a violent felony.

violence between mother and father; and neither parent had provided a urine sample for drug testing. The social worker opined that drug use was a possible underlying cause of some of the problems.

Father and mother had only one visit with the children, which occurred on February 28, 2013. Since A. had a severe case of scabies, her doctor recommended the entire household, as well as people who had skin-to-skin contact with the children, be treated to avoid re-infestation. On March 4, father and mother were told of the doctor's recommendation and asked to obtain medical clearance to continue visiting the children. Mother said she did not object to getting a medical clearance and said she would provide it that week. As of March 20, however, neither parent had contacted the social worker or provided the medical clearance.

An addendum report filed April 16, 2013, stated that father had been referred for an alcohol and drug assessment, but had not yet completed it; he had visited the children once on April 2, 2013; and he had not yet made an appointment with Sierra Vista for other services. Mother had done nothing on her services and had not visited the children at all. Grandmother told the social worker the children became very discouraged when the parents did not visit.

At the April 17, 2013 contested hearing, county counsel gave an offer of proof that the social worker would testify that since the filing of the original report, father had received the medical clearance and visited twice since the children were detained, including the February visit; and Sierra Vista cancelled father's assessment set for March 27 due to the assessor's illness and rescheduled it for the beginning of May. Father testified he had been with Robert "throughout" his whole life and had a father/son relationship with him, but admitted on cross-examination that he had been incarcerated from January to February 2006, and again from October 2006 until March 2010. In 2012, father spent 70 days in jail on a parole violation. And, so far in 2013, he had spent 19 days in jail.

Father explained why he had only visited twice. He found out in the first week of March that he needed medical clearance to see the children. Thereafter, he tried to get temporary Medi-Cal, but when he was unsuccessful, he went to the emergency room to get the clearance, which he obtained on March 27. After that, he called right away for a visit. He did not attend one visit schedule for the week before the hearing because he had to earn money to pay their utilities.

After oral argument, in which the Agency argued father failed to make the necessary showing that he had tried to change his violent and criminal lifestyle, the juvenile court found the petition's allegations true. The juvenile court noted there had been "significant substance abuse issues as well as domestic violence in the home, which has adversely impacted the parents' ability to provide the proper care of the children." The juvenile court was concerned about father's criminal history and the fact that he had been unable to "stay out of trouble for any lengthy period of time." The juvenile court also noted that the children had various health concerns mother and father were not addressing. The juvenile court adjudged the children dependents, removed them from parental custody, and denied father reunification services pursuant to section 361.5, subdivision (b)(12), but was given twice monthly supervised visitation. Mother was granted services.

#### *Six-Month Review Report and Hearing*

The October 17, 2013, report prepared for the six-month review hearing recommended termination of mother's services due to her lack of participation and progress, and a section 366.26 hearing be set for the juvenile court to consider a permanent plan of adoption. The children had been assessed for mental health services and were found to meet the medical necessity for such services. Robert and Mathew were seeing Joe Pasillas for counseling and were doing well; Robert was asked to attend a group for children in fourth grade and older to work on social and other skills. Nathaniel and A. saw other counselors and were doing well.

Father and mother visited the children together seven times between April 2, 2013 and September 5, 2013. Father visited alone three other times; his last visit was on September 20, 2013. Four visits were cancelled due to father and mother being late, and eight other visits were cancelled because father and mother were a “no call no show.” Father cancelled a visit on July 18 because they could not be there to check in on time.

Mother requested a contested hearing, which was held October 25 and 30, 2013. After hearing testimony from mother and the social worker, the juvenile court terminated mother’s services. In response to a request from mother’s counsel that “a bonding study be done,” the juvenile court stated the children would be made available for a bonding study. The section 366.26 termination hearing was set for February 21, 2014.<sup>3</sup>

#### *Section 366.26 Selection and Implementation Report*

The section 366.26 report filed on February 10, 2014 recommended termination of parental rights and adoption of all four children by the maternal grandparents, with whom they had lived since February 20, 2013 and who were committed to permanence for the children. The social worker asked the children about the prospective adoption. Robert, who appeared to have a grasp of the concept of adoption, stated that he would like to live with his grandparents “forever,” and described them as “nice. Everything she cooks is good and my grandfather works a lot.” The children were all doing well with their respective counselors. Robert had been diagnosed with ADHD and had an appointment with a doctor to determine whether medication would be recommended.

Due to an incident that took place during a visit where mother and father argued in front of the children, which resulted in mother leaving the visit, visits were changed to either separate one hour visits for each parent or supervised one-hour visits for both parents together. Mother and father had four supervised visits with the children since

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<sup>3</sup> While father filed a notice of intent to file a writ petition, he failed to follow through and we dismissed the matter on December 17, 2013. (*R.T. v. Superior Court* (Dec. 17, 2013, F068300).)



October 30, 2013; on October 31, November 14 and December 12, 2013, and on January 9, 2014. Robert did not want to come to the October 31 visit. During the December 12 visit, A. cut her finger on a razor blade that was in mother's purse.

The report stated: "Since the initial removal, the children have lived in the home of the maternal grandparents where they have thrived and are well bonded to their grandparents. It is in the best interest of the children for them to remain in the home of their grandparents and to be adopted. All of the children's needs are met as well as being able to participate in extra[-]curricular activities and remaining in the home of the grandparents will provide the children with permanency." The report noted that father still was facing criminal charges with possible prison time, and that mother continued to live with or have ongoing contact with father despite past severe domestic violence. The Agency recommended termination of parental rights.

#### *Section 388 Petition*

On February 19, 2014, father filed a section 388 petition seeking to open reunification services for himself. Father alleged circumstances had changed because he had completed a 12-week parenting class; had visited the children and spoke to them on the phone about twice a week; and he was no longer on parole and had not been arrested for any new offenses. Father alleged providing him with services would be better for the children because they love their father, and Dr. Jeffery Miller determined that Robert "would suffer detriment outweighing the benefits of adoption if parental rights were terminated." Nothing was attached from Dr. Miller.

The juvenile court summarily denied the petition the same day, finding that the request did not state new evidence or a change of circumstances. The juvenile court explained that completing a 12-week parenting class did not evidence a significant

change of circumstances when the children were removed due to substance abuse, domestic violence and neglect, and there was no evidence as to Dr. Miller's findings.<sup>4</sup>

*The Section 366.26 Hearing*

The February 21, 2014 section 366.26 hearing was continued numerous times and ultimately held on August 5, 2014. The Agency filed an addendum report in Robert's case, attached to which was a bonding study of the relationship between father and Robert completed by Cheryl K. Carmichael, Ph.D., which the juvenile court read and considered. The juvenile court also received into evidence a bonding assessment prepared, at the request of father's counsel, by Jeffrey E. Miller, Ph.D.

Dr. Miller assessed the degree of bonding and attachment between father and Robert. Dr. Miller interviewed father for an hour, observed Robert with father on one occasion for 30 minutes, interviewed and evaluated Robert for 20 minutes, and had telephone interviews with the maternal grandmother and father. Dr. Miller also unsuccessfully attempted to interview Robert's therapist.

Father told Dr. Miller that before the children were removed from his care, he had been in and out of incarceration on various charges. When father was home with Robert, they had a "good" relationship; they often joked with one another, played video games and catch, and father helped Robert with his homework. Father described his visits with Robert. When visits began, Robert tended to be "hyper" and excited to see his parents, and when visits ended, Robert became "emotional," would tell father he wanted to go back home with them, and would ask mother when she would be taking her parenting classes. At the end of the last visit, Robert cried and told father he missed him and wanted to be with him. Father believed Robert would be "troubled" if he was not allowed any further contact with Robert; father was concerned that grandmother would

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<sup>4</sup> Father appealed the juvenile court's summary denial of his section 388 petition. In an unpublished opinion, we affirmed the juvenile court's order. (*In re R.T.* (Aug. 7, 2014, F069288.)

not allow him any further contact with Robert if she adopted the children, as he had a conflicted relationship with her. Father admitted his past gang involvement and criminal history, but believed he has benefited from his mistakes; he wanted to ensure that Robert did not become involved in that type of lifestyle. Father believed if he had regular contact with Robert, he could help him avoid the use of illicit drugs, gang involvement, and other delinquent-type behaviors.

Grandmother told Dr. Miller that Robert had made a “pretty good” adjustment to living with her. At first he attempted to control and parent his siblings because he was often placed in charge of them when they lived with their parents. The maternal grandparents had to tell Robert to allow them to parent his siblings. Robert had expressed concerns that he would be removed from her home and have to live somewhere else; grandmother reassured him the plan was for him to live with her permanently. Robert also was worried about mother’s safety and welfare. Due to father abusing mother in the past, Robert was concerned that father would injure mother; in the past, he had expressed anger towards father for abusing mother. According to grandmother, Robert has told her that mother is “the best mother ever” and father is “not a good dad at all.” Grandmother told Robert that father “didn’t know how to be a dad.” Grandmother, however, tried not to say anything negative to Robert about either parent.

Grandmother also told Dr. Miller that, before visiting his parents, Robert appeared happy and wanted to see them. There had been a few times Robert did not want to visit because he had sports events at school that he did not want to miss which conflicted with the visits. Following visits, there were no significant changes in Robert’s behavior or emotional functioning. Robert had told her he wanted to live back with his parents. If grandmother adopted the children, she would allow Robert to have contact with and visit father, provided father abstained from illicit drug use and did not pose a danger to Robert.

Dr. Miller observed Robert with father for about 15 minutes. At the beginning of the session, Robert appeared to be very happy and excited to see father; he immediately

ran over to father and hugged him. They briefly talked about how Robert was doing in school and whether he had been allowed to play video games at grandmother's home. They then played with different games together. At one point father looked at a rash on Robert's arm, which Robert said was eczema. After about seven minutes, Dr. Miller asked father to leave the room for a few minutes. Robert continued to play a game on his own and did not appear to be concerned about father's absence. When father returned, Robert smiled at him and they continued their games and activities. Robert's siblings joined Robert and father so Dr. Miller could observe their interactions with each other and father. A. ran over to father and sat on his lap, while the boys played with different table games. They all appeared to be happy to see and play with father and one another. Father was able to effectively set limits with the children when necessary.

Dr. Miller interviewed Robert, who told him he liked living with grandmother, as she "takes us places and takes care of us right." The only thing he disliked about living with grandmother was conflicts he had with his brothers who "don't listen to me." What made him happy was "my grandma" and "going places" with her; he was sad when grandmother became angry at him, and yelled at him and his siblings. What he liked best about being with father was playing sports and "hanging out" with him. There was nothing he disliked about father at the time, but he used to become angry at him because father would "punch" everything when he was angry.

When asked if he could live with anyone he wanted, Robert said he wanted to live with "[m]y mom and dad," because "I miss being with them and they are our parents." If he could not live with his parents, he wanted to live with his uncle "Gabe" or grandmother. Sometimes he dreamt about his parents and living back with them; in his dreams, his parents have "a house and jobs." If he was not allowed to have any further contact with father he would be "mad, sad, and angry, because I can't stay away from them." Out of all the members of his family, he believed he had the best relationships with mother and father, but "mostly mom because she is a 'yes' person and says 'yes' a

lot.” Robert completed a “Family Drawing Test,” in which he drew six figures, representing himself, mother and father on one line, and his siblings above them. He did not include his grandparents in the drawing. It appeared to Dr. Miller from this drawing that Robert saw himself as being primarily bonded with his parents rather than his grandparents.

Dr. Miller observed that while Robert had suffered neglect and witnessed domestic violence in his parents’ relationship before his removal from their care, more recently he had developed a positive relationship with father and enjoyed contact with him. While Robert had adjusted well to living with his grandparents, he was not as attached and bonded with them as with his parents. Dr. Miller opined that Robert had a parent/child type relationship with father, as Robert clearly saw him as his father, they had a positive relationship during visits, and Robert reportedly looked forward to visits and contact with father. Dr. Miller also opined that if Robert’s contact with father ended, Robert would suffer emotionally and become depressed and angry, since he was primarily attached to his parents, he fantasized about and hoped he would be reunited with them, and grandmother believed Robert should have continued contact with father.

Finally, Dr. Miller opined that continuing the parent/child relationship would promote Robert’s well-being to such a degree as to outweigh the well-being he would gain from a permanent home with his grandparents. Dr. Miller believed that given Robert’s age of 10 and his strong attachment with father, it was very important to his emotional development to continue to have regular contact and visits with father, as such contact was important to Robert’s future development and sense of identity. Dr. Miller recognized father had problems in the past, but father wanted to give Robert guidance to ensure he did not make the same mistakes as father concerning substance abuse, criminal behavior and gang affiliation, and Robert would need continued contact with father so father could provide that guidance.

Dr. Carmichael, who completed a bonding study on the Agency's behalf, came to the opposite conclusion. In completing her study, Dr. Carmichael interviewed grandmother, Robert, father, and Robert's therapist, and observed father and Robert together. Grandmother reported that Robert spent almost all summer during 2012 either at her home or the maternal aunt's home because Robert said he did not want to be home as "dad is mean to me." Grandmother said the parents agreed to this arrangement. Robert took care of his three siblings; he made their food and changed the baby's diaper. It did not surprise grandmother that upon placement, Robert continued to order the younger kids around and became upset when they did not get along or listen to him. Grandmother stated that Robert recently had relinquished most of his parental role and replaced it with additional focus on school, involvement with sports and playing with his cousins. According to grandmother, the younger boys are a handful, but Robert is very affable and easy to interact with, motivate and guide.

Pasillas had seen Robert since early in the placement, when he was assessed for emotional distress associated with the reasons for his placement. Robert was diagnosed with Post Traumatic Stress Disorder. Pasillas said it had taken him over a half a year to establish a modicum of trust with Robert, who immediately was wary because Pasillas is Hispanic and Robert was afraid. Robert was seen both individually and in group. Robert had begun to retell his story of witnessing domestic violence between his parents and being the victim of violence during the same period of time. When Pasillas queried Robert, Robert revealed he also had been hit. Pasillas consulted regularly with grandmother, who was able to incorporate parenting suggestions to best meet Robert's emotional needs quite successfully. Robert was beginning to connect his feelings of fear to his parents' erratic behavior, and to recognize the sadness associated with "wishes not coming true."

When Dr. Carmichael interviewed Robert, Robert was clear that he "really likes" living with grandmother and was content to just spend time with her. Robert said she

“takes care of me,” he gets to play football, they get to go places, she “cooks really good food,” and he has “a cool bed.” He was happy to do his homework, enjoyed school and wanted to learn about science. He loved violent video games. When questioned about the circumstances that led to him living with his grandparents, Robert became noticeably quieter and more closed; he did not mention domestic violence, drugs or guns. He briefly acknowledged his parents were not taking care of the children “right” but was reluctant to make any direct comments. He also was guarded when responding to questions about his relationship with either parent; his only response was “good.” Robert said he and father played sports and violent video games together. Robert was most animated when he talked about school, his counselor Joe, science and sports. When Dr. Carmichael told Robert she was meeting with father, Robert became quiet, looked at her out of the corner of his eye, and softly said “Be careful. My dad can be mean.” Robert visibly relaxed when Dr. Carmichael told him she was aware of the history of violence and she would be careful.

Father admitted to Dr. Carmichael that he was arrested on the guns and drugs charges but, in his opinion, the charges were not true, as he was not at home at the time, and he was appealing the charges. He was irritated with grandmother for constantly reporting him and mother for false allegations. He thought CPS believed everything grandmother said and therefore had been harassing him. He said he and mother had filed an “IRS fraud” on grandmother. Father also was appealing the juvenile court’s decision to deny him reunification services based on the past commission of a violent felony; while he admitted it was a robbery charge, he claimed it was “not really violent” and therefore he should have been given services. When asked about domestic violence, father indicated he did not hurt mother. Father did say that there were a few holes in the walls because of misunderstandings, but he did not admit directly that he put the holes there. He denied that methamphetamine was ever a problem for him or mother, but admitted he had a problem with alcohol. Father described his relationship with Robert as

always positive. They played catch and video games. He described Robert as smart, but distractible, interested in science and sports, and good at video games. It was father's sincere belief that his past history of crime and gangs were an asset to his relationship with Robert, as he could guide Robert to avoid the pitfalls of his past. He believed Robert needed his perspective, which he would not get from anyone else.

Dr. Carmichael observed father and Robert together for an hour. When Robert greeted father, the two briefly hugged. Their banter was friendly, but competitive. Father asked a series of normal questions about daily life, including how school was going, sports involvement, and how his siblings were doing at school and home. Robert answered father in the same guarded manner he answered Dr. Carmichael: "Fine," "Good." Robert did not elaborate or enliven the conversation. They spent a lot of the hour playing a board game Robert chose; soon after the game began, father took over the task of moving both of the tokens without a peep from Robert. To Dr. Carmichael this was a subtle but clear message of control. After the board game, they continued to chat away and fiddle with toys in a relaxed manner. Robert told father he was "really getting into guns." Both father and Dr. Carmichael were taken aback. Father glanced at Dr. Carmichael and then asked "what are you doing that for"? Robert did not detect father's concern but went on to say they were cool. At the end of the session, they left the room together and went to the waiting room. When Dr. Carmichael entered the waiting room two minutes later, Robert was sitting between both father and mother, swinging his legs and taking deep breaths. The look on his face was neutral; not delighted, not mad and not fearful.

From her interview with father, Dr. Carmichael concluded that father dismissed the validity and diminished the significance of his past behavior; did not acknowledge that his behavior had a substantial negative impact on his children; and blamed others, including grandmother's interference, the social worker's harassment and his current attorney's incompetent representation, for why he and mother did not have the children in



their care. With respect to Robert, Dr. Carmichael concluded that he was a bright boy who was concerned about protecting mother from father, keeping the peace with father and making sure his siblings behaved. While living with adults who were nurturing and took care of the basics of life was a relief for Robert, it was also a source of internal conflict. Because he was not in his parents' presence all the time, Robert could project both the potential for peace between them or injuries to his mother in the midst of their fights. An example of this conflict appeared during the scheduled visit with father. At first, Robert was surprised that his school day was interrupted to visit father, but instead of being excited, he was concerned about what to expect. His conflict was multiplied by the surprise presence of mother, who was not expected and whose presence he identified as being against the rules. Dr. Carmichael believed the weight of his family's "health" was directly on Robert's shoulders.

Dr. Carmichael opined that Robert and father did not have a parent/child relationship; instead, she believed their relationship was more like peers, with father having undue influence and Robert trying hard to please father and keep the peace. Dr. Carmichael explained it would be shortsighted to accurately predict the specifics of any reaction Robert might have if his relationship with father were terminated legally, as Robert was a complicated child who had been traumatized by being in his parents' care, his emotional distress had predisposed him to feel vulnerable in the face of strong emotions, and he found complex emotional situations confusing. Dr. Carmichael, however, believed Robert would be sad, as his "wish" that mother and father had a house, jobs and normalcy was dashed, and he could not make his parents better. Dr. Carmichael also believed Robert would be relieved, as he would never leave grandmother or members of his extended family that he trusted, and would not have to cover his mixed feelings for his parents. Eventually, however, Robert would get mad at his parents for letting him down, and hurting him and his siblings, and also at grandmother for her role in mother's bad behavior and his removal from his parents.

Finally, Dr. Carmichael opined the permanency of adoption promoted Robert's well-being more than maintaining the parent/child relationship. Dr. Carmichael believed Robert had a complex relationship with his parents that was based on fear, not trust, while his relationship with grandmother was simple and straightforward, and was based on trust, not fear. Dr. Carmichael explained that Robert would need to do a good deal of work in therapy to counteract his guarded behavior toward the people in his world, but the relief and emotional ease he would experience knowing he would never have to leave grandmother would allow him the emotional resilience needed to do that work.

At the hearing, the Agency submitted an offer of proof concerning father's criminal history and periods of incarceration: (1) in 2001, father was arrested for domestic violence offenses and released from custody five days later; (2) on December 24, 2004, father was arrested for gang violence and drug-related offenses, and was released on January 19, 2006, after taking a deal for 365 days of confinement on two concurrent terms; (3) father was out-of-custody for approximately nine months, when he was arrested on October 26, 2006; (4) on October 22, 2007, father was convicted of a robbery, Penal Code section 211, and received a four-year sentence; (5) father, who had been in custody since October 26, 2006, was released from custody in May 2010; (6) in September 2012, father was arrested on drugs and weapons charges, which remain pending, and incurred a parole violation; (7) father spent 70 days in confinement and was released on bail on December 4, 2012; (8) on February 5, 2013, father incurred a parole violation and spent 19 days in confinement; and (9) law enforcement was investigating a July 15, 2014 incident in which father allegedly punched grandmother's son in a store parking lot.

As a further offer of proof by the Agency, father agreed that the children should have been placed in protective custody because, in his mind, they were missing school, had medical issues, and he was incarcerated. Father, however, did not agree that he committed any acts of physical domestic violence against mother at any time in the last

10 years, although he admitted there had been verbal domestic violence. Moreover, father denied the act of domestic violence that caused the “ER” investigation in December 2012, and denied that he had a methamphetamine problem, although he agreed he had an issue with alcohol abuse 10 years ago. Father had never successfully completed any type of substance abuse treatment. Father attended visits in February, March, June and July; he missed a visit in April, although he did not remember that, and missed a visit in May because he was incarcerated.

Mother’s counsel submitted an offer of proof that mother would testify she believed she had a very strong and positive emotional attachment with the children, and believed severing rights would create substantial emotional detriment to them. Father’s counsel submitted an offer of proof that father would testify he believes the children would be irreparably damaged if his rights were severed and he has a close relationship with all of his children. Father was especially worried about Robert, because he would not have a role model, and father believed a lot of his own problems came from him not having a role model as his father (the paternal grandfather) was in prison when father was Robert’s age. Father also was very close to the younger children, including the baby, and when he lived with the children, he acted as a parent to them, feeding and clothing them, and providing them love and affection. Father wanted the court to give him a chance to show he “has left all of the bad stuff in the past.”

County counsel argued that because there was clear and convincing evidence the children were likely to be adopted, it was the parents’ burden to prove an exception to adoption, namely the beneficial parent/child relationship exception. County counsel asserted there was no evidence to suggest there was a parental bond with the younger children, or a parental bond between mother and Robert. Accordingly, counsel focused on the relationship between father and Robert, arguing that there were “all kinds of problems with Dr. Miller’s report.” Counsel further argued that adoption was in Robert’s best interest, and urged the court to rely on Dr. Carmichael’s report, which showed there

was no parent/child relationship that would cause Robert detriment if parental rights were terminated. Finally, counsel argued that father had not maintained regular visits with Robert, explaining that although father was granted twice-a-month visits, he was afforded weekly visits along with mother when mother was receiving services, but he attended only half of those visits. Counsel asked the juvenile court to terminate parental rights, as neither parent had met the burden of proving detriment.

The children's attorney joined in county counsel's argument and agreed that adoption was the better plan, pointing to Dr. Carmichael's statement in her report that Robert's relationship with his parents was based on fear, not trust. The attorney let the juvenile court know, on Robert's behalf, that he told her he would like to have visits with mother.

Mother's counsel argued the juvenile court should apply the beneficial relationship exception. Father's counsel also argued the beneficial relationship exception applied, as Dr. Miller opined Robert was bonded primarily with his parents and had a parent/child relationship with father.

The juvenile court found the children adoptable and terminated parental rights. In discussing the beneficial parent/child relationship exception, the juvenile court stated that it did not doubt that Robert loved his parents. The juvenile court, however, believed there had been domestic violence and that Robert was well aware of father's propensities for violence, as demonstrated by Robert's warning to Dr. Carmichael, a woman he had never met, to "[b]e careful" because his father "can be mean." The juvenile court found this "very alarming." The juvenile court further stated that while father might be a role model, he certainly was not a positive role model, and it was "extremely scary" that Robert was trying to relate to father on father's level by stating that he was getting into guns, which indicated father had not presented a positive or beneficial role model for Robert. The juvenile court noted that even in Dr. Miller's report, Robert expressed concerns about being removed from his grandparents' home, and while Robert may look

to father as a buddy, this was not the type of bond that was positive or should be encouraged. It appeared to the juvenile court, even based on Dr. Miller's report, that Robert looked to his grandmother for support and security, not his father. Moreover, Dr. Miller's report was not convincing to the court when he spent only 15 minutes watching father and Robert interact.

The juvenile court found that mother had not met her burden, as she would have to present more than just her opinion that it would be detrimental to terminate the parental relationship. With respect to father, the court believed there was a bond, but not a positive one, and that the evidence showed the bond with Robert was more of a playmate and not the type of bond that was beneficial to Robert or strong enough to outweigh the benefits of adoption. The juvenile court noted for the record that it found the parents had not regularly and consistently visited the children, as there had been lapses in visits.

Accordingly, the juvenile court found, based on clear and convincing evidence, that it was very likely the children would be adopted; that termination of parental rights would not be detrimental to the children; and the permanent plan of adoption was appropriate. The juvenile court ordered adoption as the permanent plan and terminated parental rights.

### **DISCUSSION**

Father contends the juvenile court erred when it declined to apply to Robert the statutory exception to adoption of section 366.26, subdivision (c)(1)(B)(i), known as the beneficial parental relationship exception. He asserts he met his burden of proving both that he had regular visitation and contact with Robert, and Robert would benefit from continuing his relationship with him, such that it would be detrimental to Robert to terminate his parental rights. He also asserts the juvenile court failed to consider Robert's stated wishes concerning adoption, as required by section 366.26, subdivision (h)(1).

There is a split of authority concerning the standard of review in this context. (See *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315 (*Bailey J.*) and *In re K.P.* (2012) 203 Cal.App.4th 614, 621–622 [hybrid combination of substantial evidence and abuse of discretion standards; applying substantial evidence test to determination of the existence of a beneficial parental or sibling relationship and the abuse of discretion test to issue of whether that relationship constitutes a compelling reason for determining that termination would be detrimental to the child]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*) [substantial evidence test—“On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order”]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*) [abuse of discretion test].) Father asserts the substantial evidence standard of review applies to our review of the beneficial parental relationship exception, while the Agency asserts review is for abuse of discretion.

Our conclusion in this case would be the same under any of these standards because the practical differences between the standards are “not significant,” as they all give deference to the juvenile court’s judgment. (See *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) “[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only “‘if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he [or she] did.’ . . .”” (*Id.* at p. 1351.) Moreover, a substantial evidence challenge to the juvenile court’s failure to find a beneficial parental or sibling relationship cannot succeed unless the undisputed facts establish the existence of those relationships, since such a challenge amounts to a contention that the “undisputed facts lead to only one conclusion.” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1529 (*I.W.*); *Bailey J.*, *supra*, 189 Cal.App.4th at p. 1314.)

Once the court determines a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) To avoid termination of parental rights under the parent-child relationship exception, the juvenile court must find “a compelling reason for determining that termination would be detrimental to the child” due to the circumstance that “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).)

“Sporadic visitation is insufficient to satisfy the first prong” of the exception. (*In re C.F.* (2011) 193 Cal.App.4th 549, 554 (*C.F.*).) Satisfying the second prong requires the parent to prove that “severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

The Court of Appeal in *Autumn H.* defined a beneficial parent/child relationship as one that “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) “[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Ibid.*)

A parent must show more than frequent and loving contact or pleasant visits for the exception to apply. (*C.F., supra*, 193 Cal.App.4th at p. 555; *In re C.B.* (2010) 190

Cal.App.4th 102, 126; *I.W.*, *supra*, 180 Cal.App.4th at p. 1527.) “The parent must show he or she occupies a parental role in the child’s life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.] Further, to establish the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show the child would suffer detriment if his or her relationship with the parent were terminated.” (*C.F.*, *supra*, at p. 555.)

Here, the juvenile court found that father failed to satisfy both prongs of the exception, namely that he did not regularly and consistently visit Robert, and Robert would not benefit from continuing his relationship with father. With respect to visitation, the record shows that father participated in about half of the visits available to him. His visits consisted of the following: two visits between the children’s February 2013 detention and the April 17, 2013 jurisdiction hearing, when weekly visits were available; 10 visits between April 17 and September 20, 2013, when father was afforded weekly visits with mother, with father missing 13 visits during that period; and, once visits were reduced to once a month, father attended eight of the 10 available visits between October 31, 2013 and July 2014, with Robert refusing to attend one of the eight visits. Father points out that during the first time period, he was prevented from visiting until he obtained a medical clearance, which he was not able to do until March 27, 2013. But even after obtaining the medical clearance he did not visit consistently. As we have already stated, sporadic visits are insufficient. While father contends the juvenile court did not make a finding on this prong, the record belies his claim, as the juvenile court specifically stated on the record that it found there had been lapses in visitation “and the parents have not regularly and consistently visited.”

Even if father visited regularly and consistently, however, the juvenile court did not err when it found that father had not met his burden of proving that Robert would benefit from continuing a relationship with him, as he had not shown that relationship promoted Robert’s wellbeing to such a degree that it outweighed the wellbeing Robert



would gain in a permanent home with his grandparents. Father contends the juvenile court erred in so finding, because the evidence showed: (1) except for the four years father was in prison, Robert had been raised by father, who took care of, clothed, fed and parented the children; (2) interactions between the two were positive; (3) Robert's own statements indicated a positive relationship, exemplified by Robert's statement to Dr. Miller that he would be "mad, sad, and angry because he can't stay away" from his parents; (4) father wanted to help Robert steer clear of his own past mistakes, which Dr. Miller opined was an important reason for the two to maintain contact; and (5) Dr. Miller opined Robert would be depressed and angry if contact was terminated.

Father, however, ignores the other evidence that supports the juvenile court's decision. Robert certainly was bonded to father, as he enjoyed visits and expressed a desire to live with his parents, but his relationship with father was not a healthy one and father was not a positive role model. Father had been incarcerated for approximately half of Robert's life at the time of detention. When Robert lived with his parents, he took on a parental role so that he could protect his siblings, as his parents were unavailable to them, which role he had difficulty relinquishing when was placed with his grandparents. Robert knew about the domestic violence between his parents, as evidenced by grandmother's statement that Robert was concerned that father would injure mother, that Robert revealed to his therapist he had witnessed domestic violence and had himself been hit, and his caution to Dr. Carmichael that his father could be mean. As Dr. Carmichael observed, Robert was guarded both when questioned about his relationship with father and when he was with father, and father appeared to want to control their time together. While father thought of himself as a positive role model, criminal charges against him were pending, he continued to commit criminal acts, he diminished the significance of his past behavior and blamed others for the reason the children were dependents, and Robert had a concerning interest in guns. Statements in both bonding studies showed that Robert looked to grandmother, not father, for support and security. Based on this evidence, the

juvenile court reasonably could conclude, as it did, that father's relationship with Robert did not promote his wellbeing to such a degree that it outweighed the wellbeing he would gain in a permanent home with his grandparents.

Father asserts Robert did not want his parental rights terminated, but relies solely on Robert's statement to Dr. Miller that if he did not have further contact with father, he would be "mad, sad, and angry, because I can't stay away from them." He ignores Robert's other statements, such as those to the social worker that he wanted to live with his grandparents "forever" and to Dr. Carmichael that he really liked living with grandmother, as well as Robert's guarded responses when Dr. Carmichael questioned him about his relationship with his parents, from which the juvenile court could conclude that Robert actually was conflicted about a continued relationship with father and was concerned about being removed from grandmother's home. Father contends Dr. Carmichael's bonding study cannot support the juvenile court's order because it was based on conjecture and misinformation. His contentions include the following claims: (1) Dr. Carmichael's unfounded assumption there was domestic violence in the home that frightened the children, or that father injured mother, which led her to conclude Robert did not have a parental bond with father; (2) the lack of evidence that Robert did not feel nurtured by his parents; (3) the assumption that Robert's PTSD was based on the parents' actions rather than on Robert's removal from their custody; (4) Dr. Carmichael's failure to observe father in a situation where he had to act parental; (5) Dr. Carmichael's observation that Robert appeared relaxed with father conflicted with her conclusions that father had an undue influence over Robert, and Robert tried hard to please and keep the peace; and (6) Dr. Carmichael's predictions were not based on Robert's wishes regarding the termination of parental rights, as she did not even ask him his opinion on this. From this, father argues there is not an evidentiary basis for the juvenile court's finding that father's relationship with Robert was based on fear, the juvenile court erred in relying on Dr. Carmichael's bonding study, which was not as reliable as Dr. Miller's study, and the

juvenile court lacked substantial evidence and abused its discretion in finding the lack of a positive parental bond that would cause great harm to Robert should it be severed.

We disagree that Dr. Carmichael's opinions are not supported by the evidence. Robert's therapist told Dr. Carmichael that Robert revealed to him that he had both witnessed domestic violence and had himself been hit, which the juvenile court reasonably could assume contributed to Robert's PTSD. Robert's parents certainly did not nurture him when they left him in charge of his siblings. Although Dr. Carmichael described Robert as being relaxed around father, she also described him as being guarded and cautious around father, and observed father trying to exert control over Robert. Moreover, Robert's statement to Dr. Carmichael that father could be mean demonstrates Robert feared father. Father's criticism of Dr. Carmichael's opinion essentially is an invitation to us to reweigh the evidence in his favor. That, however, is not within this court's authority, as we may not reweigh or express an independent judgment on the evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) Issues of fact and credibility are matters for the juvenile court alone. (*Ibid.*)

Father relies on several cases in which appellate courts reversed orders forgoing application of the beneficial relationship exception. (See *In re Scott B.* (2010) 188 Cal.App.4th 452 (*Scott B.*); *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*); *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*)) *Amber M.* hinged on strong evidence (including expert psychological opinion based on a bonding study) that the three dependent children would be harmed by ending their relationship with mother, as well as the absence of any pertinent evidence supporting the social worker's contrary opinion. (*Amber M.*, at pp. 689-690.) Likewise, the evidence relied on by the *S.B.* court to reverse the juvenile court was bolstered by the results of a bonding study performed by an expert witness (*S.B.*, at p. 295), the conclusion of which was that "because the bond between [father and daughter] was fairly strong, there was a potential for harm to [daughter] were she to lose the parent-child relationship." (*Id.* at p. 296.) The child in *Scott B.* was 11

years old, had spent nearly all his life living with his mother before the dependency, the two had a very close relationship, and the child repeatedly insisted he preferred to live with his mother. (*Scott B.*, at p. 471.) It was clear the child's "emotional makeup will not enable him to endure interruption of his long-standing frequent visits with" his mother. (*Id.* at p. 472.)

None of these cases compel a reversal here. Each dependency case "must be viewed in light of its particular facts." (*In re Jason J.* (2009) 175 Cal.App.4th 922, 937.) No case "stand[s] for the proposition that a termination order is subject to reversal whenever there is 'some measure of benefit' in continued contact between parent and child." (*Ibid.*) Father can point to some similarities between the instant case and past cases resulting in reversals. But unlike cases in which reversal occurred, here there is evidence in the record that Robert and father did not have a parent/child relationship and while Robert could be affected emotionally if parental rights were terminated, the permanency of adoption promoted Robert's wellbeing more than maintaining his relationship with father.

Finally, father contends the order terminating parental rights must be reversed because the juvenile court failed to consider Robert's wishes. Specifically, he asserts the record does not show that the juvenile court considered Robert's statements to Dr. Miller that he would be mad, sad, and angry if he could no longer see father, and that he wanted to live with his parents, which he asserts shows that Robert objected to adoption.

Section 366.26, subdivision (h)(1) requires the juvenile court at the selection and implementation hearing to "consider the wishes of the child." While the court may consider the child's wishes, it is required to act in the child's best interests, and a child's wishes are not necessarily determinative of a child's best interests. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1087.) The court must consider the child's wishes only to the extent those wishes are ascertainable. (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 820.) A child may not be able to understand the concept of adoption. (*In re Juan H.*

(1992) 11 Cal.App.4th 169, 173.) Moreover, although the juvenile court is obligated to consider a child's best interest at the section 366.26 hearing, the juvenile court need not follow the child's wishes unless he or she is over the age of 12. (§ 366.26, subds.(c)(1)(B), (h).) Thus, even though then 10-year-old Robert may have wanted to live with his parents, and said he would be mad, sad and angry if he lost contact with father, maintaining their relationship may not be in his best interest and the juvenile court may nonetheless terminate parental rights.

Here, there was conflicting evidence concerning Robert's wishes. While he told Dr. Miller that he would be mad, sad and angry if he could no longer see father and he wanted to live with his parents, he told the social worker he wanted to live with his grandparents forever and he told grandmother he was concerned about being removed from her home. The juvenile court implicitly considered these statements when it reviewed the report and bonding studies. Moreover, there was substantial evidence that Robert would be better served by being adopted by his grandparents. Father has not demonstrated error.

In sum, on the entire record we cannot say that no judge reasonably could have made the decision made here, i.e. that father failed to prove Robert would benefit from continuing their relationship; neither can we say that the undisputed facts lead to only one conclusion. Accordingly, we have no choice but to affirm the juvenile court's order. Since we affirm, mother's assertion that remand is required to ascertain the applicability of the sibling relationship exception to adoption is meritless.

**DISPOSITION**

The order terminating parental rights is affirmed.

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GOMES, Acting P.J.

WE CONCUR:

\_\_\_\_\_  
PEÑA, J.

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SMITH, J.